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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16491

D.C. No. 2:16-cv-01019-DGC

[Filed May 31, 2019]

ARIZONA LIBERTARIAN PARTY; MICHAEL KIELSKY, *Plaintiffs-Appellants*,	)
v.	)
KATIE HOBBS, in her official capacity as Secretary of State of Arizona, *Defendant-Appellee.*	)

OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted March 12, 2019
San Francisco, California

Filed May 31, 2019

Before: J. Clifford Wallace, A. Wallace Tashima, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Civil Rights / Elections

The panel affirmed the district court's summary judgment in favor of Arizona's Secretary of State in an action brought by the Arizona Libertarian Party challenging, under the First and Fourteenth Amendments, a state law requiring up to 1% of voters eligible to participate in Arizona's primary to sign a nominating petition for a Libertarian candidate to earn a place on the primary ballot.

Applying the balancing framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the panel first held that the State's signature requirement imposed a minimal burden on the Libertarian Party's right to access the primary ballot. Accordingly, the panel determined that a less exacting scrutiny was appropriate. The panel concluded that Arizona's signature requirements reasonably furthered Arizona's regulatory interest in preventing voter confusion, ballot overcrowding, and frivolous candidacies and justified the modest burden on the Libertarian Party's right to ballot access.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel rejected the Libertarian Party's contention that the Arizona law infringed upon its right to free association by effectively requiring its candidates to solicit signatures from non-members. The panel held that any burden on the Libertarian Party's associational freedom was modest, and again applying less exacting scrutiny, the panel credited Arizona's important interests to justify the reasonable requirements.

The panel further rejected the Libertarian Party's contention that Arizona's signature requirement violated equal protection, noting that the Libertarian, Democratic, and Republican Parties were all subject to the same statutory requirements. The panel observed no equal protection issue in Arizona's treatment of the Green Party, a new party that was subject to different statutory requirements.

COUNSEL

Oliver B. Hall (argued), Center for Competitive Democracy, Washington, D.C., for Plaintiffs-Appellants.

Kara M. Karlson (argued) and Joseph E. La Rue, Assistant Attorneys General; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Defendant-Appellee.

OPINION

McKEOWN, Circuit Judge:

Once again, we have before us a challenge to Arizona's requirements to earn a place on the ballot. *See, e.g.*, *Ariz. Green Party v. Reagan*, 838 F.3d 983 (9th Cir. 2016); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). The Arizona Libertarian Party challenges under the First and Fourteenth Amendments a state law requiring up to 1% of voters eligible to participate in its primary to sign a nominating petition for a Libertarian candidate to earn a place on the primary ballot. The district court granted summary judgment to the Arizona Secretary of State (the "Secretary"), and we affirm.

BACKGROUND

Under Arizona law, there are two types of political parties: "established" parties and "new" parties. A party is "established" in a jurisdiction if it (i) obtained at least 5% of the total votes cast in the prior general election, or (ii) maintains membership exceeding 0.66% of registered voters in that jurisdiction. Ariz. Rev. Stat. § 16-804 (applying to state, county, city, and town elections). An established party is entitled to "continued representation" on the general election ballot. *Id.* The Libertarian, Democratic, and Republican Parties are established statewide.[1]

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[1] The Libertarian Party satisfies the voter registration requirement, and the Democratic and Republican Parties satisfy both requirements. As of January 1, 2019, Arizona had 1.31 million registered Republicans, 1.17 million registered Democrats, and

Before 2016, to qualify for the primary ballot, an established party candidate needed to submit signatures[2] exceeding a certain percentage (ranging between 0.5% and 2%, depending on the office sought) of the party's registered voters in the jurisdiction where he sought election. Ariz. Rev. Stat. § 16-322(A) (2015). A candidate was permitted to submit signatures from party members, members of any new party, or unaffiliated registered voters.[3] *Id.* § 16-321(D).

In 2015, the Arizona legislature amended the signature requirements for established party candidates. 2015 Ariz. Sess. Laws Ch. 293, §§ 2–3 (H.B. 2608). Now, to qualify for a primary ballot, an established party candidate must submit signatures exceeding a certain percentage of "qualified signer[s]," which include the party's registered voters, as well as all new party voters and unaffiliated registered voters. Ariz. Rev. Stat. § 16-321(F). The amendments reduced the signature threshold for each office to between 0.25% and 1%. *Id.* § 16-322(A). In 2016—the first election governed by the amended rules—there were

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32,056 registered Libertarians. Ariz. Sec. of State, *Voter Registration & Historical Election Data*, https://azsos.gov/elections/voter-registration-historical-election-data (last visited May 7, 2019).

[2] A voter may only sign one nominating petition per office per election, unless more than one candidate is to be elected to that office. Ariz. Rev. Stat. § 16-321(A).

[3] As of January 1, 2019, Arizona had 1.25 million unaffiliated registered voters. Ariz. Sec. of State, *Voter Registration & Historical Election Data*, https://azsos.gov/elections/voter-registration-historical-election-data (last visited May 7, 2019).

significantly fewer Libertarian candidates on the primary and general election ballots than in prior elections. *See generally* Ariz. Sec. of State, *Historical Election Results & Information*, https://azsos.gov/elections/voter-registration-historical-election-data/historical-election-results-information (last visited May 7, 2019) (collecting data for recent Arizona elections).

A "new" party is subject to different rules. A new party must first submit a petition for recognition and signatures from eligible voters exceeding 1.33% of total votes cast statewide in the prior gubernatorial election. Ariz. Rev. Stat. §§ 16-801(A), 16-803. After doing so, the party's candidates are eligible to pursue placement on the primary and general election ballots for the next four years. Ariz. Rev. Stat. § 16-801(B). To retain its recognition and ballot eligibility at the end of the four years, the party must either qualify as an established party or file another petition for recognition and the accompanying signatures. *Id.*; *see* Ariz. Rev. Stat. §§ 16-803–04.

To qualify for the primary ballot, a new party candidate must submit signatures exceeding 0.1% "of the total vote for the winning candidate or candidates for governor or presidential electors at the last general election within the district." Ariz. Rev. Stat. § 16-322(C). The Arizona Green Party first qualified as a new party in 1990, and, never having qualified as an established party, has successfully re-filed petitions for new party recognition and the accompanying

signatures several times, most recently in 2014.[4] Since the beginning of 2017, Arizona has permitted digital solicitation and streamlined submission of voter signatures through an online portal. Ariz. Rev. Stat. §§ 16-316–18.

Under Arizona law, an established party member may not vote in another party's primary, but it is up to the established parties to decide whether new party members or unaffiliated voters can participate in their primaries. *See* Ariz. Rev. Stat. § 16-467.[5] The Libertarian Party excludes such voters, while the Democratic and Republican Parties do not.

In April 2016, the Libertarian Party and its chairman Michael Kielsky (collectively, the "Libertarian Party") filed this action challenging the primary signature requirements. The district court denied the Libertarian Party's request for a preliminary injunction prohibiting enforcement of the amended requirements for the 2016 election. The parties filed cross-motions for summary judgment, and, in July 2017, the district court granted summary judgment to the Secretary.

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[4] As of January 1, 2019, the Green Party had 6,450 registered members in Arizona. Ariz. Sec. of State, *Voter Registration & Historical Election Data*, https://azsos.gov/elections/voter-registration-historical-election-data (last visited May 7, 2019).

[5] A state may not keep a party from welcoming unaffiliated voters to participate in its primary, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213–29 (1986), though it may prohibit party members from participating in another party's primary. *Clingman v. Beaver*, 544 U.S. 581, 586–97 (2005).

ANALYSIS

The Libertarian Party contends that Arizona's ballot access scheme violates equal protection and infringes upon the right to place its candidates on the ballot[6] and the right to free association.[7] Only the rules governing access to the *primary* election ballot are at issue on this appeal—the Libertarian Party does not call into question the rules for earning a place on the *general* election ballot. With that in mind, we first set forth the balancing framework that guides our review and then explain why Arizona's rules for accessing the primary ballot are constitutionally sound.

I. The *Anderson/Burdick* Balancing Framework

There is an inevitable tension between a state's authority and need to regulate its elections and the First and Fourteenth Amendment rights of voters, candidates, and political parties. *See Storer v. Brown*, 415 U.S. 724, 729–30 (1974). To harmonize these competing demands, we look to *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), which provide a "flexible standard" for

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[6] The Libertarian Party also contends that the statute violates its right to create and establish a political party. *See Norman v. Reed*, 502 U.S. 279, 288 (1992). This claim merely recites the right to access the ballot claim, and it fails for the same reasons. *See infra* pp.9–14.

[7] The Libertarian Party also appeals the district court's exclusion of certain evidence. That issue is moot because summary judgment for the Secretary is warranted even if we consider the excluded evidence.

reviewing constitutional challenges to state election regulations:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). We have described this approach as a "sliding scale"—the more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny. *Ariz. Green Party*, 838 F.3d at 988. To pass constitutional muster, a state law imposing a severe burden must be narrowly tailored to advance "compelling" interests. *Norman*, 502 U.S. at 289. On the other hand, a law imposing a minimal burden need only reasonably advance "important" interests. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434).

We now consider each of the Libertarian Party's constitutional challenges under the *Anderson*/*Burdick* balancing framework.

II. Right to Access the Ballot

It was long ago established that a state may condition ballot placement on a "preliminary showing

of a significant modicum of support." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). And there is no dispute that a state may require a candidate to demonstrate support from slightly, but not "substantially," more than 5% of voters without imposing a severe burden triggering heightened scrutiny. *Storer*, 415 U.S. at 739–40; *see Jenness*, 403 U.S. at 442; *Williams v. Rhodes*, 393 U.S. 23, 24–25 (1968) (invalidating 15% requirement). The Libertarian Party contends that Arizona law imposes an impermissibly high signature burden, reaching as high as 30% for certain candidates. Yet, the threshold—and dispositive—question is *which pool of voters* we should consider when measuring this showing.

Under Arizona law, all qualified signers—Libertarian Party members, unaffiliated registered voters, and new party members—are eligible to participate in the Libertarian Party primary and to sign a Libertarian Party nominating petition. By its very terms, the statute never requires signatures from more than 1% of these voters. However, by choice, the Libertarian Party has barred non-members from voting in its primary—under party policy, only members can vote in the primary. And it does not want its candidates to solicit signatures from non-members; as a consequence, Libertarian candidates must submit signatures equal to 11% to 30% of party membership in their jurisdiction to qualify for the primary ballot. Thus, our dilemma: is the "significant modicum of support" measured against all voters eligible under state law to sign a nominating petition and participate in the primary? Or do we factor in a party's decision to exclude certain eligible voters from its primary and

instead consider the resulting, significantly circumscribed pool?

The Supreme Court has never expressly answered this question, but its framework in ballot access cases is instructive. The state laws challenged in *Norman*, *Jenness*, and *Williams* required candidates and parties seeking placement on the general election ballot to submit signatures from registered voters equaling a designated percentage of the general election electorate.[8] The Court's approach in these cases was straightforward: it determined whether the required signatures represented a reasonable share of the voters eligible to participate in the upcoming election. *See Norman*, 502 U.S. at 295; *Jenness*, 403 U.S. at 438–40, 442; *Williams*, 393 U.S. at 24–25, 30–34. In *American Party of Texas*[9] and *Storer*, the state laws imposed similar requirements, with an additional limitation: a voter who participated in another party's primary or convention or signed another candidate's petition was ineligible to sign a nominating petition.[10] In both cases,

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[8] The laws challenged in *Norman and Williams* approximated the electorate by reference to the number of voters who participated in the preceding general election. *Norman*, 502 U.S. at 282 n.2; *Williams*, 393 U.S. at 24–25. The law challenged in *Jenness* approximated the electorate by reference to the number of registered voters during the previous general election. 403 U.S. at 432–33.

[9] *Am. Party of Tex. v. White*, 415 U.S. 767 (1974).

[10] Like the laws challenged in *Norman* and *Williams*, those at issue in *American Party of Texas* and *Storer* approximated the electorate by reference to the number of voters who participated in the

the Court determined whether the required signatures represented a reasonable share of the "available pool" of signers, i.e., voters who had not disqualified themselves by participating in another primary or convention or by signing a previous petition. *Storer*, 415 U.S. at 739–40; *see Am. Party*, 415 U.S. at 774–91.

In each of these cases, the Court asked whether the required signatures constituted an unfairly large percentage of those voters *eligible under state law* to offer their signatures. There was no adjustment to account for the significant portion of this pool comprised of registered members of other parties, many of whom, it can be reasonably presumed, were unlikely to help nominate a competing candidate or party. Nor was there any suggestion that a candidate should be limited to seeking signatures from voters who have already pledged their support to the candidate or his party or cause. Rather, the Court time and again affirmed that requiring a demonstration of "significant, measurable quantum of community support" does not impose a severe burden. *Am. Party*, 415 U.S. at 782.

We invoked a similar analysis in *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010). And we do so again here. Arizona law permits all qualified signers—Libertarian Party members, new party members, and registered unaffiliated voters—to sign a Libertarian candidate's nominating petition and to vote in the Libertarian primary. However, qualified signers

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preceding general election. *Am. Party*, 415 U.S. at 774–75 & nn.6–7; *Storer*, 415 U.S. at 726–27, 739–40.

who already signed another candidate's nominating petition are excluded from the "available pool" of voters able to sign a Libertarian candidate's petition.

No evidence suggests that, in practice, the statute's (at most) 1% signature requirement even approaches 5% of this remaining pool of eligible signers. It falls upon the Libertarian Party to demonstrate that Arizona imposes a severe burden, and it has failed to do so here. The party's policy choice to exclude all non-members from its primary and its preference to obtain signatures only from party members do not change the calculus. To hold otherwise would permit a party to determine the number of signatures required by manipulating its nominating petition and primary voting requirements. At the same time, the Libertarian Party's proposed rule would incentivize parties to have fewer registered members and therefore artificially reduce the signature requirements. Just as important: where, in this scheme, is the offensive state action? There is no question that the signature requirement would be constitutional if the Libertarian Party permitted non-members to vote in its primary. A political party cannot manipulate its internal preferences and processes to transform a constitutional statute into an unconstitutional one.[11]

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[11] Neither of the cases cited by the Libertarian Party persuades us otherwise. One addressed a law that made it "impossible either absolutely . . . or practically" for a candidate to meet a signature requirement. *See Consumer Party v. Davis*, 633 F. Supp. 877, 883 (E.D. Pa. 1986). The other struck down signature requirements because they imposed disparate requirements on similarly situated parties that were, the state conceded, impossible to justify. *In re*

Crucially, Arizona law does not impose any other requirements, such as a strict time period for signature collection, that might nonetheless render the 1% requirement "an impossible burden" or "an impractical undertaking." *Storer*, 415 U.S. at 740 (requiring 1,000 canvassers to collect 14 signatures each day for 24 days likely imposes a modest burden); *see Clingman*, 544 U.S. at 589–90 (limiting a party's internal structure, decision-making processes, and ability to communicate with the electorate likely imposes a severe burden); *Timmons*, 520 U.S. at 363 (same); *Anderson*, 460 U.S. at 790–94 (requiring an independent candidate to file several months before party conventions imposes severe burden); *Am. Party*, 415 U.S. at 778–81 (requiring all signatures to be notarized and submitted in 55-day period does not impose severe burden); *Jenness*, 403 U.S. at 434, 438 (permitting 180 days for collection of nominating signatures and requiring submission of signatures five months before election does not impose severe burden); *Williams*, 393 U.S. at 24–25 & n.1 (conditioning minor party's ballot access on formation of statewide and county-level party committees, participation in a national party convention, and submission of nominating signatures by an early deadline exclusively from voters who never voted in a previous election imposes significant burden). To the contrary, Arizona permits candidates to solicit and submit signatures through an easy-to-use and streamlined online portal. A candidate collecting hand-written signatures must, in practice, collect more

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Candidacy of Indep. Party Candidates v. Kiffmeyer, 688 N.W.2d 854, 859–61 (Minn. 2004).

than the minimum number of signatures required because, inevitably, some will be deemed ineligible. In contrast, signatures submitted through the online portal are instantaneously verified, thereby reducing the need to submit signatures above the threshold.

The limited evidence describing the Libertarian Party's modest efforts to mobilize voters and several candidates' unsuccessful write-in campaigns fails to establish that, in practice, Arizona law "imposes insurmountable obstacles" to getting on the primary ballot. *Am. Party*, 415 U.S. at 784. Nor does the simple fact that the Libertarian Party had more candidates on past primary and general election ballots reflect such an obstacle under the amended rules. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 196–97 (1986). Accordingly, we apply "less exacting" scrutiny because Arizona law imposes a minimal burden on the Libertarian Party's right to access the primary ballot. *Timmons*, 520 U.S. at 358; *see Cronin*, 620 F.3d at 1218.

We now turn to whether Arizona has an "important regulatory interest" that justifies this modest burden. *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). Arizona's asserted interests in preventing voter confusion, ballot overcrowding, and frivolous candidacies are important interests that have justified equally, if not more, burdensome general election ballot restrictions. *See Munro*, 479 U.S. at 194–95. These interests are also important in the primary context, given the "obvious and strong interconnection" between primary and general elections, which together operate as a "single instrumentality for choice of officers." *Pub.*

Integrity All., Inc. v. City of Tucson, 836 F.3d 1019, 1026 (9th Cir. 2016) (quoting *Smith v. Allwright*, 321 U.S. 649, 660 (1944)); *see Storer*, 415 U.S. at 735 (A primary election "functions to winnow out and finally reject all but the chosen candidates."). Conditioning primary ballot placement on a demonstration of significant community support advances Arizona's interests in the administration of its primary *and* general elections. *See Anderson*, 460 U.S. at 788–89; *see also Jenness*, 403 U.S. at 442; *Munro*, 479 U.S. at 193–94.

Because we neither require "a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies," *Munro*, 479 U.S. at 194–95, nor proof that ballot rules are "the only or the best way to further the proffered interests," *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011), Arizona has easily met its burden. The primary signature requirements reasonably further Arizona's important regulatory interests and therefore justify a modest burden on the Libertarian Party's right to ballot access.

III. Right to Free Association

The Libertarian Party contends that Arizona law infringes upon its right to free association by effectively requiring its candidates to solicit signatures from non-members. Although the Constitution protects a political party's right to not associate with non-members, that right has its limits. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973). We first ask whether Arizona in any way "forces" the Libertarian Party to associate with non-

members. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577, 581–82, 586 (2000). If so, we then consider whether such forced association creates a "risk that nonparty members will skew either primary results or candidates' positions." *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003). We answer both questions in the negative.

Unlike the state laws at issue in *Jones* and *Bayless*, Arizona law permits political parties to exclude non-members from voting in their primaries. At their option, Libertarian candidates *may* use signatures from non-party members to qualify for the primary ballot—but Arizona law does not require them to do so. Soliciting non-member signatures would seemingly prove helpful in placing more candidates on the primary ballot, but it is the Libertarian Party's modest membership, not a "state-imposed restriction on [its] freedom of association," that imposes upon it this "hard choice." *Jones*, 530 U.S. at 584.[12]

We acknowledge, without deciding, that there may be some point where the ratio between party members and required signatures constitutes *de facto* forced

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[12] In *Jenness*, the Supreme Court noted that, for an independent or minor party candidate seeking "signatures of 5% of the eligible electorate[,] . . . the way is open [because] Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions." 403 U.S. at 438. The Court identified various limitations on signature collection that could be, but were not, imposed under Georgia law. *Id.* at 438–39. That a minor party candidate would likely obtain signatures from non-party members was presupposed by the Court, not as a bug of this system, but as a positive feature. *Id.*

association with non-members. For example, if the signature requirement exceeded the number of party members, then a candidate necessarily would, as a matter of arithmetic, have to solicit non-member signatures to qualify for the ballot. But we face no such situation here. Libertarian candidates can qualify for the primary ballot with signatures from 11% to 30% of party members in their jurisdictions, and no evidence suggests it is impossible to do so as a practical matter. Even if collecting these signatures is difficult, we expect "[h]ard work and sacrifice by dedicated volunteers" in the operation of "any political organization." *Am. Party*, 415 U.S. at 787. Such expectations do not in any way "force" Libertarian candidates or voters to associate with non-members.

Nor has the Libertarian Party demonstrated that the solicitation and submission of some non-member signatures "will skew either primary results or candidates' positions." *Bayless*, 351 F.3d at 1282. We decline to embrace such a speculative conclusion. Any burden on the Libertarian Party's associational freedom is modest, so we again apply less exacting scrutiny and, as above, credit Arizona's important interests to justify these reasonable requirements. *See Timmons*, 520 U.S. at 358.

IV. Equal Protection

Finally, the Libertarian Party contends that the signature requirements violate equal protection because they impose lesser burdens on other parties.[13]

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[13] Despite their differences, we assume, without deciding, that the Libertarian Party is similarly situated to the Democratic,

The Libertarian, Democratic, and Republican Parties are all established parties subject to the same statutory requirements. Although, on its face, Arizona law treats them identically, we look to see whether the requirements provide "a real and essentially equal opportunity for ballot qualification." *Am. Party*, 415 U.S. at 788. That standard is clearly satisfied here. A Libertarian candidate vying for the primary ballot actually faces a significantly *lower* burden than his Democratic and Republican counterparts. For example, a statewide Libertarian candidate needs to submit approximately 3,200 signatures, compared to 6,000 and 6,400 signatures for the Democratic and Republican competitors, respectively. *See* Ariz. Rev. Stat. § 16-322(A)(1); Ariz. Sec. of State, *Voter Registration & Historical Election Data*, https://azsos.gov/elections/voter-registration-historical-election-data (last visited May 7, 2019).[14]

That a Libertarian candidate must submit signatures representing a higher percentage of his party membership than a Democratic or Republican candidate is a consequence of the Libertarian Party's modest size, not a fatal flaw of the statutory scheme. The Supreme Court has indicated that an analogous imbalance lacks constitutional significance. In *Illinois State Board of Elections v. Socialist Workers Party*, the

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Republican, and Green Parties and that the Equal Protection Clause applies. *See Cronin*, 620 F.3d at 1218.

[14] Of course, the signature ratio between parties varies within each political subdivision, as voters are not perfectly distributed throughout the state. The statewide figures are sufficiently representative for our purposes.

Court struck down on equal protection grounds a state law requiring local candidates to submit substantially more signatures to qualify for the ballot than statewide candidates. 440 U.S. 173, 186–87 (1979). The remedy: imposing the same, 25,000 signature requirement for both local and statewide candidates, even though the eligible voter pool for statewide candidates was *six times* larger than for certain local candidates. *See id.* at 183–87. If such an outcome comports with equal protection, then surely so does the situation here.

Even if we assume that the signature requirements impose a marginally higher burden on the Libertarian Party, that additional burden is far from severe. *Cf. Williams*, 393 U.S. at 25 (striking down state law that imposed "substantially smaller burdens" on certain parties, while making it "virtually impossible" for others to place a candidate on the ballot). Under less exacting scrutiny, we again conclude that the same important regulatory interests justify the signature requirements. In setting the threshold for a "significant modicum of support," *Jenness*, 403 U.S. at 442, a state must use either an absolute number of voters or a percentage of some group. Not only is it mathematically impossible to craft a statute where the burden on each party is identical under both measurements, Arizona has no obligation to seek such precision. *See Dudum*, 640 F.3d at 1114 (recognizing regulations need not be "narrowly tailored"). Nor was Arizona required to replicate or fold in the preexisting burdens on each party when it amended the ballot access rules in 2015. *Cf. Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (rejecting an argument "creat[ing] a 'one-way ratchet' that would

discourage states from" increasing ballot access, "lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances"). Arizona's choice to set the threshold as a percentage of qualified signers for each established party was neither discriminatory nor unreasonable.

Arizona opted to apply these signature requirements for all parties that have a significant membership and therefore exempt such parties from the quadrennial party-wide recertification requirements imposed on new parties. This policy affords significant benefits to all established parties and furthers the state's interests in avoiding voter confusion, minimizing clutter on the primary and general ballots, and eliminating frivolous candidacies.[15]

We likewise observe no equal protection issue in Arizona's treatment of the Green Party, a new party subject to different statutory requirements. When, as here, we "examin[e] differing treatments of [different types of political parties], . . . [i]n determining the nature and magnitude of the burden that [the state's] election procedures impose on the [complaining party], we must examine the entire scheme regulating ballot

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[15] The Libertarian Party's reliance on *Kiffmeyer* is, once again, unpersuasive. There, two minor political parties were subject to the same ballot access rules; under those rules, one party had all of its candidates placed on the general election ballot, and the other had none on the ballot, even though the latter received significantly more votes in the primary. *Kiffmeyer*, 688 N.W.2d at 859–61. Minnesota conceded that its these rules were arbitrary and lacked any "rational . . . purpose." *Id.* at 861.

access." *Cronin*, 620 F.3d at 1217 (internal quotations and citation omitted). Equal protection is violated when one set of requirements is "inherently" or "invidiously" more burdensome than the other. *Am. Party*, 415 U.S. at 781; *Jenness*, 403 U.S. at 440–41; *Cronin*, 620 F.3d at 1218–19.

The Libertarian Party's chief complaint is that Green Party candidates qualified for the 2016 primary ballot with significantly fewer signatures than Libertarian candidates for the same races.[16] This argument fails to account for the significant quadrennial re-filing burden placed on the Green Party to retain its new party status. Every four years, the Green Party, which currently boasts less than 6,500 members, must submit more than 20,000 signatures for its candidates to be eligible to pursue placement on the ballot. That is, signatures from three times more voters than it has registered members. Meeting the re-filing requirements is "an all-consuming endeavor" for the Green Party, which relies on "a core group of about 10 volunteers" to work "every weekend on Saturdays and Sundays for several hours each" for more than a year. It is only once this step is complete that the modest individual candidate signature thresholds apply. Thus,

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[16] The Libertarian Party also complains that a write-in new party candidate automatically qualifies for the general election ballot by winning his primary, while a write-in established party candidate only qualifies for the general election ballot if he wins his primary with votes equaling the number of signatures needed to qualify for the primary ballot. *See* Ariz. Rev. Stat. § 16-645(D)–(E). Because the Libertarian Party expressly disclaims any challenge to Arizona's general election ballot access requirements, we do not consider this argument.

it is obvious that the primary ballot signature requirements for the Libertarian Party are not "inherently" or "invidiously" more burdensome than those imposed on the Green Party. *Am. Party*, 415 U.S. at 781; *Jenness*, 403 U.S. at 440–41. To be sure, "[t]he procedures are different, but the Equal Protection Clause does not necessarily forbid the one in preference to the other." *Am. Party*, 415 U.S. at 781–82.

CONCLUSION

Arizona has no "constitutional imperative to reduce voter apathy or to 'handicap' an unpopular [party] to increase the likelihood that [its] candidate[s] will" qualify for the primary ballot. *Munro*, 479 U.S. at 198. The state's signature requirements are reasonable restrictions that impose, at most, a modest burden on the Libertarian Party's First and Fourteenth Amendment rights, while directly advancing Arizona's important regulatory interests. The district court correctly granted summary judgment to the Secretary.

AFFIRMED.

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Results & Information

Voter Registration Counts

Arizona Election Laws & Publications

Lobbyists

Voter Registration & Historical Election Data

Voter Registration Statistics - January 1, 2019*

PARTY NAME	**REGISTERED VOTERS**
Democratic	1,170,825
Green	6,450
Libertarian	32,056
Republican	1,312,638
Other	1,252,047
Total	**3,774,016**

**Voter registration statistics are calculated as prescribed by A.R.S. § 16-168(G)*

Most Recent Voter Registration Report (PDF)

View Past Years' Registration Numbers

Historical Election Information

General Election Information
1998-2016

Election Year (Click for more information)	Registered Voters	Ballots Cast	Voter Turnout (%)
2018	3,716,263	2,409,910	64.85
2016	3,588,466	2,661,497	74.17
2014	3,235,963	1,537,671	47.52
2012	3,124,712	2,323,579	74.36
2010	3,146,418	1,750,840	55.65
2008	2,987,451	2,320,851	77.69
2006	2,568,401	1,533,032	60.47
2004	2,643,331	2,038,069	77.10
2002	2,229,180	1,255,615	56.33
2000	2,173,122	1,559,520	71.76
1998	2,264,301	1,037,550	45.82

Primary Election Information
1998-2018

Election Year (Click for more information)	Registered Voters	Ballots Cast	Voter Turnout (%)
2018	3,632,337	1,208,113	33.26
2016	3,400,628	989,754	29.10
2014	3,247,146	877,270	27.02
2012	3,100,575	870,875	28.09
2010	3,102,876	933,650	30.09
2008	2,799,390	638,348	22.80
2006	2,533,308	584,526	23.07
2004	2,440,144	602,888	24.71
2002	2,207,450	557,437	25.25
2000	2,042,462	486,836	23.84
1998	1,921,565	377,855	19.66

View Previous Election Years (2018-1974)

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1998 Election Information

1996 Election Information

- General Election Canvass PDF
- General Election Precinct Level Results by County (File Formats provided by County, see index.xls)
- 1996 Presidential Preference Election Canvass (PDF)
- 1996 General Election Unofficial Results
- 1996 Primary Election Unofficial Results
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- Ballot Propositions PDF

1994 Election Information

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- General Election Precinct Level Results by County (File Formats provided by County, see index.xls)
- Primary Election Canvass PDF
- Primary Election Precinct Level Results by County (File Formats provided by County, see index.xls)

- Ballot Propositions PDF

1992 Election Information

- General Election Canvass PDF
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1990 Election Information

- General Election Canvass PDF
- Ballot Propositions (Publicity Pamphlet) in English PDF
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APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-16-01019-PHX-DGC

[Filed July 10, 2017]

Arizona Libertarian Party, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Michele Reagan,	)
	)
Defendant.	)
	)

ORDER

Plaintiffs Arizona Libertarian Party ("AZLP") and Michael Kielsky, the party's chairman and a candidate for public office, challenge the constitutionality of A.R.S. §§ 16-321 and 16-322 as amended in 2015 by H.B. 2608. Doc. 42. Plaintiffs have filed a motion for summary judgment. Doc. 63. Defendant Michele Reagan, the Arizona Secretary of State ("the Secretary"), has filed a cross-motion for summary judgment. Doc. 69. The motions are fully briefed (Docs. 63, 69, 71, 73), and the Court heard oral argument on

June 28, 2017. For the reasons that follow, the Court will deny Plaintiffs' motion and grant the Secretary's motion.

I. Background.

Arizona law provides that a party qualifies for continued representation on the general ballot if its registered members compromise at least two-thirds of one percent of total registered voters. A.R.S. § 16-804. A party that does not meet this requirement may qualify to appear on the ballot by filing a petition signed by a number of qualified voters equal to or greater than one and one-third percent of the total votes cast for governor in the immediately preceding general election. A.R.S. § 16-801(A). It is undisputed that AZLP qualifies for continued representation on the general election ballot. Doc. 64 at 2, ¶ 4; Doc. 70 at 2, ¶ 4.[1]

When a candidate from a continued-representation party wishes to have her name appear on the general election ballot, she must follow one of two paths. The candidate may, on a specified date before her party's primary election, file a nomination petition that includes a specified number of signatures from voters in the relevant jurisdiction. *See* A.R.S. §§ 16-322(A), 16-314(A). The candidate must then win the primary by receiving more votes than any other candidate from her party. A.R.S. § 16-645(A). Alternatively, she may

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[1] Parties may also qualify for continued representation if its members cast 5% of the total votes for governor or presidential electors in the last general election. A.R.S. § 16-804(A). AZLP does not qualify using this method.

qualify for the general election as a write-in candidate. A.R.S. § 16-312(A). This path also requires the filing of a nomination petition before the primary election, but the petition need not be supported by voter signatures. Instead, the candidate must win the primary election and receive a number of write-in votes "equivalent to at least the same number of signatures required by § 16-322 for nominating petitions for the same office." A.R.S. § 16-645(E).

H.B. 2608 became effective on July 3, 2015. Doc. 12 at 3. Among other changes, it altered the pool of persons from which candidates affiliated with a political party can collect signatures for nomination petitions. Under the old system, a candidate could collect signatures only from people who were qualified to vote in the candidate's primary election. *See* 2015 Ariz. Sess. Laws Ch. 293, §§ 2-3 (H.B. 2608). Thus, if a candidate's party chose to hold an open primary, the candidate could collect signatures from registered party members, registered independents, and unaffiliated voters. If a candidate's party opted for a closed primary, the candidate could collect signatures only from registered members of her party.

H.B. 2608 redefined the pool of eligible signers – referred to in the bill as "qualified signers" – to include (1) registered members of the candidate's party, (2) registered members of a political party that is not entitled to continued representation on the ballot under A.R.S. § 16-804, and (3) voters who are registered as independent or having no party preference. A.R.S. § 16-321(F). This redefined pool applies whether a candidate's party holds an open or a closed primary.

This pool of "qualified signers" is larger than the pool available before H.B. 2608 for candidates whose parties hold closed primaries. Although H.B. 2608 lowered the prescribed percentage of the pool from which candidates must obtain signatures, it actually increased the number of signatures closed-primary candidates must obtain by increasing the pool of signers against which the percentage is measured. *See* 2015 Ariz. Sess. Laws Ch. 293, § 3 (H.B. 2608).

The increase is significant for AZLP candidates. For example, an AZLP candidate competing in legislative district 11 in 2012 needed to collect 25 signatures to access the primary ballot, or 25 write-in votes to access the general election ballot. Doc. 1 at 36, ¶ 2. In 2016, the new law required an AZLP candidate in district 11 to obtain 220 signatures or write-in votes, a number which represents 26.12% of registered AZLP members in the district. *Id.* at 38, ¶ 9. AZLP candidates seeking other Arizona offices face similar increases in both raw numbers and percentages of registered AZLP members. *Id.* at 36-37, ¶ 3; 38, ¶ 10 (congressional district 1 increased from 60 to 636 signatures or write-in votes, or 25.75% of AZLP members in the district); *id.* at 40, ¶¶ 2-3 (Arizona Corporation Commission increased from 130 to 3,023 signatures or write-in votes, or 11.9% of AZLP members state-wide); *id.* at 50, ¶¶ 10-11 (Maricopa County Attorney increased from 88 to 1,881 signatures or write-in votes, or 11.18% of AZLP members in Maricopa County).

Plaintiffs filed a motion for a preliminary injunction, asking the Court to enjoin application of A.R.S. §§ 16-321 and 16-322 to write-in candidates in

the 2016 election. They asked the Court to order the Secretary to place write-in candidates on the general election ballot if they win the AZLP primary and receive the number of write-in votes required before the passage of H.B. 2608. Doc. 18 at 5. The Court denied the motion, finding that Plaintiffs had not demonstrated a likelihood of success on the merits. Doc. 34. The Court considered only the constitutionality of the write-in method for achieving ballot access, and did not consider the petition signatures method. On this summary judgment motion, the Court considers Arizona's procedures for candidate ballot access as a whole.

II. Legal Standard.

A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

III. Motion to Strike.

The Secretary filed a motion to strike certain portions of Plaintiffs' motion for summary judgment and related statement of facts, contending that Plaintiffs failed to disclose witnesses whose declarations were submitted with the motion. Additionally, the Secretary argues that Plaintiffs rely on impermissible hearsay.[2]

A. Undisclosed Declarants.

Federal Rule of Civil Procedure 26 requires parties to disclose "the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment[.]" Fed. R. Civ. P. 26(a)(1)(A)(i). If a party makes an inadequate disclosure, it must supplement or correct the disclosure in a timely manner. Fed. R. Civ. P. 26(e)(1)(A). If a party fails to provide information required by Rule 26(a) or (e), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Plaintiffs' motion for summary judgment relies on declarations from six persons that the Secretary

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[2] The Court denied the motion to strike and ordered the Secretary to address the permissibility of Plaintiffs' evidence in her summary judgment briefing. Doc. 68. The Secretary renewed the motion in her cross-motion for summary judgment. Doc. 69 at 24.

contends were never disclosed under Rule 26(a). Doc. 66 at 9; Doc. 71 at 4. Plaintiffs do not contend that they disclosed these individuals under Rule 26(a), but argue that they were disclosed by alternative means. Doc. 71 at 4. First, Plaintiffs argue that the Secretary identified in her own initial disclosures the following persons as likely to have discoverable information: "Any individual that gathered signatures to run as a Libertarian candidate in the 2016 election cycle," and "Any individual running as a write-in candidate in the Libertarian Party in the 2016 election cycle." *Id.* The six declarants fall within these descriptions. On March 2, 2017, Plaintiffs responded to the Secretary's Interrogatory No. 1 by stating that they would provide a list of candidates who had advised AZLP of their intention to run. *Id.* Plaintiffs provided this list on March 9, including contact information for the candidates. *Id.* On March 17, 2017, the deadline for completion of fact discovery, the Secretary asked Plaintiffs whether they had produced the list of candidates, and Plaintiffs confirmed that they had and resent a direct link to the list.[3] *Id.* While Plaintiffs contend that this course of events shows that the Secretary knew of the individuals who submitted declarations in support of Plaintiffs' motion for summary judgment, it is insufficient to satisfy Rule 26(a) disclosure requirements for several reasons.

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[3] The deadline for completing fact discovery was extended to March 17, 2017 in an order dated January 13, 2017. Doc. 56 at 2. All depositions were required to commence at least five working days before the deadline. *Id.*

Rule 26(a) requires a party to identify "each individual" it "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 863 (9th Cir. 2014); *Robert Kubicek Architects & Assocs., Inc. v. Bosley*, No. CV-11-01945-PHX-JAT, 2013 WL 998222, at *1 (D. Ariz. Mar. 13, 2013). The disclosure must include the name of the individual, the individual's address and phone number, and the subject of the information in the individual's possession. Fed. R. Civ. P. 26(a)(1)(A)(i). The obvious purpose of the rule is to enable the opposing party to prepare to deal with the individual's evidence in the case. *See Ollier*, 768 F.3d at 862-63 ("After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context.").

Plaintiffs argue that because the Secretary identified a broad class of individuals as having relevant information (those who attempted to run for office as AZLP candidates in 2016), and requested that Plaintiffs identify those individuals, Rule 26(a) was satisfied. But the purpose of Rule 26(a)'s initial disclosure requirement is not merely to apprise the opposing party of the existence of individuals with relevant information, it is to tell the opposing party which individuals the disclosing party "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). The fact that a party has identified individuals as having relevant information does

nothing to inform that party of whether the opposing party may use the individuals as witnesses in the case.

The list Plaintiffs provided included the names of 27 people, their phone numbers and email addresses. Doc. 67-1 at 23-26. Plaintiffs did not disclose the nature of any relevant information these individuals might have, or whether Plaintiffs were considering using them as witnesses in this case. The Secretary received the list, apparently with other discovery documents, less than two weeks before the discovery deadline and with only a few days to schedule depositions.

Because the Secretary was not told that Plaintiffs may use the six declarants to support their claims, and the declarants were not identified until it was too late to depose them, the Court concludes that Plaintiffs failed to satisfy their initial or supplementary disclosure obligations under Rule 26(a) and (e). *See L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 125 F. Supp. 3d 1155, 1169 (D. Colo. 2015) ("a party's collateral disclosure of information . . . must [be] in such a form and of such specificity as to be the functional equivalent of a supplemental discovery response; merely pointing to places in the discovery where the information was mentioned in passing is not sufficient"); *see also Wallace v. U.S.A.A. Life Gen. Agency, Inc.*, 862 F. Supp. 2d 1062, 1067 (D. Nev. 2012) (finding a party's identification of an individual in response to the opposing party's interrogatories insufficient to satisfy the disclosure requirements of Rule 26(a) because, among other reasons, the party did not identify the individual as someone with information that the party may use in establishing its case).

Plaintiffs also argue that the Secretary misstates the duty imposed by Rule 26(a) when she contends that Plaintiffs were required to identify which "candidates the Plaintiffs intended to call as witnesses." Doc. 71 at 6 (quoting Doc. 66 at 7). As Plaintiff notes, a party must identify trial witnesses only thirty days before trial unless otherwise ordered by the court. Fed. R. Civ. P. 26(a)(3)(B). But this is an additional disclosure requirement. It does not affect the party's separate obligation to identify in its initial disclosures all individuals with relevant information whom the party "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). As the commentary to the Federal Rules makes clear, "'[u]se' includes any use at a pretrial conference, to support a motion, or at trial." Steven S. Gensler, Federal Rules of Civil Procedure, Rules and Commentary Rule 26 (Feb. 2017).

To avoid preclusion, Plaintiffs have the burden of showing that their failure to disclose the six declarants was substantially justified or harmless. Fed. R. Civ. P. 37(c)(1); *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012). Plaintiffs provide no explanation for their failure to include the declarants in their initial or supplemental Rule 26(a) disclosures, and therefore have not shown that it was substantially justified. Because Plaintiffs' failure to disclose the six declarants impeded the ability of the Secretary to depose those declarants and obtain additional evidence to counter their declarations, the Court concludes that it was not harmless. *See Ollier*,

768 F.3d at 863. The Court accordingly will grant the Secretary's motion to strike.[4]

B. Hearsay.

The Secretary also asks the Court to strike evidence provided by Plaintiff Kielsky regarding the efforts of another individual to obtain ballot access, contending that this evidence is inadmissible hearsay. Doc. 66 at 10. Plaintiffs' motion for summary judgment cites to Kielsky's third declaration for the proposition that "only one candidate qualified to appear on AZLP's primary ballot in 2016, and he did so only by working on his petition drive full-time for approximately 70 days." Doc. 63 at 12 (citing Doc. 18 at 22, Third Kielsky Dec., ¶ 6). These statements were made with respect to candidate Gregory Kelly. *Id.* The Secretary contends that the only way Kielsky could know that Kelly worked full-time for a specific number of days is if he was told this information, as it is impossible for him to have this information through personal observation of the candidate. Doc. 66 at 10.

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[4] Rule 37(c)(1) sanctions are generally mandatory if a party violates its duty to disclose or supplement. The Ninth Circuit has held, however, that when application of Rule 37(c)(1) sanctions will "amount[] to dismissal of a claim, the district court [i]s required to consider whether the claimed noncompliance involved willfulness, fault, or bad faith." *R & R Sails*, 673 F.3d at 1247. The Court's exclusion of the six declarations does not amount to dismissal of Plaintiffs' claim. As the Court explains below, the grant of the Secretary's motion for summary judgment is not based on the absence of these witnesses, and their presence would not result in a different outcome.

Plaintiffs do not argue that Kielsky's statement is offered for something other than the truth of the matter asserted, or that Kielsky acquired this information from first-hand observation. Plaintiffs assert that he obtained this information through contemporaneous reports "submitted directly to Plaintiff Kielsky in his capacity as Chair of AZLP, which have been submitted into the record." *Id.* They argue that Kielsky "is competent to testify to all matters relating to" his position as Chair of AZLP. Doc. 71 at 7 n.2.

Competency is not the question. The Secretary's objection is based on hearsay, and Plaintiffs provide no basis for finding that Kielsky's statements regarding Mr. Kelly's signature-collection efforts are not hearsay or fall within a hearsay exception. Plaintiffs assert that the record upon which Kielsky relied has been placed in the record, and cite to the Second Declaration of Michael Kielsky (*id.*), but the second declaration merely attaches an email from Mr. Kelly stating that he has devoted 45 days (not 70 days) to "getting on the ballot" (Doc. 10 at 26). Nothing about the email suggests a solution to the hearsay problem. It clearly is an out-of-court statement offered for the truth of the matter asserted, and Plaintiffs identify no rule that would permit its admission at trial or in support of their summary judgment motion.[5]

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[5] The email from Mr. Kelly is address to AZLP (Doc. 10 at 26), but Plaintiffs provide no evidence or argument that the email would be admissible as a business record of AZLP under Rule 803(6).

The Secretary also asks the Court to strike a statement first contained in Plaintiffs' reply brief. Doc. 73 at 6. Plaintiffs quote a letter from a supporter sent to Kielsky, stating that the supporter "couldn't interest any independents (other than family) to sign" his nomination petitions. Doc. 71 at 18 (quoting Doc. 10 at 28). This too is hearsay, and Plaintiffs have identified no basis on which it is admissible.

IV. Constitutional Analysis.

Plaintiffs argue that A.R.S. §§ 16-321 and 16-322 violate the First and Fourteenth Amendments. Doc. 42. Specifically, Plaintiffs contend that the provisions place an impermissible burden on them under the Supreme Court's ballot access jurisprudence and in violation of their rights to freedom of speech, petition, assembly, and association for political purposes. Doc. 42 at 21-22, ¶ 59 (Count I); Doc. 63 at 4. Plaintiffs also argue that the provisions violate their rights to freedom of association and equal protection of the laws. Doc. 42 at 22-25 (Counts II and IV); Doc. 63 at 4, 13-16.[6]

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[6] In Count III, Plaintiffs allege a separate violation of their right to form a political party under the First and Fourteenth Amendments. Doc. 42 at 22-23. While they present a separate argument section concerning this right in their briefing (Doc. 71 at 19-20), they do not identify a separate test to be applied in determining if this right has been violated. Courts have identified the First and Fourteenth Amendment rights of voters and candidates implicated by ballot access restrictions, and tend to analyze them together using one test. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 & n.7 (1983). As a result, the Court will consider Count III together with Count I, applying the test outlined below.

"States have a major role to play in structuring and monitoring the election process," but this power is not without limits. *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). "Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quotation marks and citation omitted); *accord. Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008).

Thus, the validity of a state election law is determined by applying a "balancing and means-ends fit analysis." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016). If the First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important

regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed,* 502 U.S. 279, 289 (1992)). There is no litmus-paper test for separating valid and invalid election restrictions. Courts must make hard judgments based on the facts and circumstances of each case. *Storer v. Brown*, 415 U.S. 724, 730 (1974). In this case, the Court must balance Arizona's interest in ensuring a modicum of support for general election candidates against the burden imposed on Plaintiffs' First and Fourteenth Amendment rights by A.R.S. §§ 16-321 and 16-322.

A. The Burden on Plaintiffs.

1. Relevant Supreme Court Cases.

The Supreme Court has on several occasions addressed the constitutionality of state limitations on the ability of candidates to appear on the ballot. In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Supreme Court addressed a series of election laws in Ohio that required members of new political parties who wished to appear on the presidential ballot to submit petitions signed by 15% of the number of voters in the last gubernatorial election and to satisfy other procedural hurdles. *Id*. at 24-25. The Supreme Court found that Ohio's "restrictive provisions [made] it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties" (*id.* at 25), and held that the Ohio laws violated the Equal Protection Clause of the Fourteenth Amendment (*id.* at 34).

In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Supreme Court addressed a Georgia law that permitted

a candidate who failed to enter or win his party's primary election to have his name placed on the general election ballot if he obtained signatures from 5% of the voters eligible to vote in the last general election. *Id.* at 432. The Court found that the 5% requirement, although higher than most states, was "balanced by the fact that Georgia [had] imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.* at 442. The Court upheld the 5% requirement. *Id.*

In *Storer*, the Supreme Court examined a California law that required independent candidates who wished to appear on the general election ballot to obtain signatures of between 5% and 6% of the entire vote cast in the preceding general election in the area where the candidate sought office. 415 U.S. at 726-27. The candidate's petition could not, however, be signed by voters who had voted in the preceding primary election (*id.* at 739), and all signatures had to be obtained during a 24-day period following the primary (*id.* at 727). Because the pool of qualified signers was reduced by excluding primary election voters – a reduction which would have the effect of requiring a candidate to obtain signatures from more than 5% or 6% of the available signers – the Supreme Court remanded the case to determine the precise extent of the burden. *Id.* at 740, 746.

In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court considered a series of Texas laws that provided four methods for placing candidates on the general election ballot. *Id.* at 772. Of particular

relevance here, minor political parties were allowed to nominate candidates through party conventions. *Id.* at 777. But to have these nominees appear on the general ballot, the parties were required to demonstrate support in the form of convention participants numbering at least 1% of the total votes cast for governor at the last general election. *Id.* If the required number of individuals did not participate in the nominating convention, the party could secure its candidate's position on the general ballot by circulating petitions for signature. *Id.* The party was required to obtain signatures from persons equaling 1% of the total votes in the last gubernatorial election, but a voter who had already participated in any other party's primary election or nominating process was ineligible to participate in a second nominating convention or sign a petition. *Id.* at 778. Additionally each signer had to give a notarized oath that she had not participated in any other party's nominating or qualification proceeding. *Id.* The Court upheld this scheme, finding, as a whole, that it "afford[ed] minority political parties a real and essentially equal opportunity for ballot qualification." *Id.* at 788.

In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Supreme Court addressed the validity of a Washington law which required that a minority-party candidate for an office receive at least 1% of all votes cast for that office in the State's blanket primary election before she would be included on the general election ballot. *Id.* at 190. Because Washington used a blanket primary, registered voters could vote for any candidate regardless of the candidate's party affiliation. *Id.* at 192. The Court noted that "States may

condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Id.* at 194. Emphasizing that there is no "litmus-paper test" for deciding when a ballot restriction violates First and Fourteenth Amendment rights, the Court held that the Washington requirement was valid. *Id.* at 195, 199.[7]

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[7] The Ninth Circuit considered the constitutionality of ballot access restrictions in *Lightfoot v. Eu*, 964 F.2d 865, 869 (9th Cir. 1992), *as amended* (July 6, 1992). *Lightfoot* considered a challenge to a California law which provided that write-in candidates could qualify for the general election ballot by receiving votes in the primary "equal in number to 1 percent of all votes cast for the office at the last preceding general election." *Id.* at 866. As here, AZLP had chosen to hold a closed primary. *Id.* at 870. The Ninth Circuit upheld the requirement, finding it "not significant that it was impossible for any Libertarian write-in candidate to meet the 1% threshold in the 1988 primary." *Id.* at 870. It noted that "the small number of voters eligible to vote in the Libertarian primary is not an impediment created by the State of California[,]" and that the party could choose to open its primary to non-party members or increase its membership to reduce its burden. *Id.* As the Court noted in its previous order, *Lightfoot* is not controlling because the Ninth Circuit based its ruling at least in part on the fact that California law included an alternative path that provided "easy access to the primary ballot" – a minor party candidate could simply gather 40 to 65 signatures. *Id.* at 870-72. While Arizona law provides an alternate route of signature gathering to appear on the primary ballot, Arizona's signature requirements are significantly higher than those imposed by the California law. Thus, the Court must still consider the Arizona scheme as a whole to determine whether it provides reasonable access to the ballot.

2. The Burden Imposed by the Arizona Statutes.

Plaintiffs contend that no federal court has upheld a statute requiring support from more than 5% of eligible voters, and that A.R.S. §§ 16-321 and 16-322 require AZLP candidates to secure support from up to 30% of eligible voters in AZLP's closed primary. Doc. 71 at 7. In making this argument, Plaintiffs compare the number of signatures or write-in votes required by the statutes to the number of voters eligible to vote in AZLP's closed primary. Doc. 63 at 5. Using this denominator, Plaintiffs assert that they are required to collect signatures or write-in votes of between 11% and 30% of eligible voters for the primary.

The Court's previous order questioned whether this was the correct math – whether the required number of petition signatures or write-in votes should be divided by the number of voters who can participate in the AZLP closed primary or by the number of qualified signers under the statute. Doc. 34 at 8-10. The two approaches produce very different results. Dividing by the number of qualified signers results in the percentages identified in the statutes – between 0.25% and 0.50% for most offices. Doc. 70 at 1, ¶ 2; Doc. 72-2 at 1, ¶ 2. This is well within the 5% limit upheld by the Supreme Court. Dividing by the number of AZLP registered voters allowed to participate in the closed primary produces the much larger percentages emphasized by Plaintiffs – up to 30% for some offices. Doc. 34 at 10.

Plaintiffs advance several arguments in support of their math. The Court will address these arguments in

the next section of this order, but first will look at the actual numbers involved in this case.

Plaintiffs agreed during oral argument that Arizona could, consistent with *Jenness* and other Supreme Court cases, require candidates to obtain signatures from 5% of the voters eligible to vote in the last general election, provided it did not erect other obstacles to their participation. *See Jenness*, 403 U.S. at 442. During the 2016 general election, there were 3,588,466 registered voters in Arizona. *See* Arizona Secretary of State, Voter Registration & Historical Election Data, https://www.azsos.gov/elections/voter-registration-historical-election-data (last visited July 3, 2017). Thus, Arizona lawfully could require an AZLP candidate to obtain 179,423 signatures – 5% of the total number of registered voters – to appear on the general election ballot for a statewide office.

Instead, Arizona has adopted a two-step process. First, AZLP has qualified as a party entitled to continuing representation on the general election ballot by having a membership equal to at least two-thirds of one percent of all registered voters in the State (at least 23,684 members in 2016). A.R.S. § 16-804(B). Second, as members of such a qualified party, AZLP candidates for general state offices must obtain petition signatures or write-in votes equal to 0.25% of qualified signers under the statute, which in 2016 amounted to 3,034. Doc. 42-2 at 3.

The contrast between what is constitutionally permissible (179,423 petition signatures) and what Arizona requires (party membership of less than one percent of registered voters and petition signatures or

write-in votes totaling 3,034) is striking. Looking only at these numbers, and recognizing that Plaintiffs make other arguments that must be addressed below, it is difficult to conclude that Arizona's requirement is unconstitutionally burdensome. Statements in various Supreme Court cases seem to confirm this initial impression. In *Storer*, the Court observed:

> Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,542 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President.

415 U.S. at 740. In *American Party*, the Supreme Court noted that collecting 22,000 signatures in 55 days "does not appear to be either impossible or impractical, and we are unwilling to assume that the requirement imposes a substantially greater hardship on minority party access to the ballot." 415 U.S. at 783, 786.

Comparison to other Arizona parties and candidates is also informative. Independent candidates may appear on the Arizona general election ballot only if they obtain signatures from 3% of voters registered to vote in the relevant jurisdiction and who are not affiliated with a party qualified for representation on the next general election ballot. A.R.S. § 16-341 (E), (F). In 2016, this required 37,077 signatures to appear on the general election ballot for statewide office, more than ten times the number required from AZLP candidates. *See* Arizona Secretary of State, Voter

Registration & Historical Election Data, https://www.azsos.gov/elections/voter-registration-historical-election-data (last visited July 3, 2017) (reporting 1,235,911 registered voters in Arizona in 2016 who were not members of the Democratic, Green, AZLP, or Republican parties).

Candidates from the major parties also have higher burdens than AZLP candidates. Republican candidates for statewide office must secure 5,801 petition signatures or write-in votes to make the general ballot, and Democratic candidates must secure 5,352. Doc. 42-2 at 3; Doc. 70 at 3, ¶ 10. The requirement for Green Party candidates is lower – 806 signatures or write-in votes – but the Green Party faces a hurdle AZLP does not. *Id.* Because the Green Party does not have enough members to qualify for continuing representation on the general ballot, the Green Party must secure at least 25,000 petition signatures every four years, a requirement not imposed on AZLP, Republicans, or Democrats. A.R.S. § 16-803; Doc. 42-4 at 2, ¶ 3; Doc. 70 at 7, ¶ 38.

Thus, when actual numbers are considered, the ballot-qualification requirements for AZLP candidates are well below constitutionally permissible requirements and lower than those imposed on other candidates in Arizona.

3. Plaintiffs' Arguments.

As noted, Plaintiffs argue that the Arizona laws are unconstitutional because they require signatures or write-in votes from more than 5% of voters when the percentage is calculated on the basis of persons

permitted to vote in their closed primary. Plaintiffs make several arguments in support of this math. The Court does not find them persuasive.[8]

a. Ballot Qualification of AZLP.

Plaintiffs argue that Arizona has already determined that AZLP has the requisite modicum of support to qualify for continued representation on the ballot, and that no additional requirements are needed to further the State's interest. Doc. 63 at 5. As Plaintiffs acknowledge, however, support for a party is distinct from support for a candidate. *Id.* at 5-6. Cases recognize that states have a legitimate interest in ensuring that *candidates* – not just parties – have a significant modicum of support before their names appear on general ballots. *See Anderson*, 460 U.S. at 788 n.9 ("The State has the undoubted right to require *candidates* to make a preliminary showing of

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[8] Plaintiffs make some separate arguments with respect to Arizona's write-in requirements for ballot access. To the extent Plaintiffs argue that write-in requirements are too stringent because they can be satisfied only through votes in the limited primary election, the Court notes that states are not required to provide a write-in method for qualifying for a general election ballot. *Burdick*, 504 U.S. at 441 ("when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights . . . a prohibition on write-in voting will be presumptively valid."). If a state's ballot-qualification scheme can pass constitutional muster by providing no write-in method for qualifying, it certainly can pass constitutional muster by providing a restricted write-in method, so long as its other ballot-access methods are reasonable. Because the Court finds Arizona's signature method reasonable, it need not address Plaintiffs' separate write-in arguments.

substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous *candidates*.") (emphasis added); *Am. Party*, 415 U.S. at 789 ("requiring *independent candidates* to evidence a 'significant modicum of support' is not unconstitutional") (quoting *Jenness*, 403 U.S. at 442) (emphasis added, footnote omitted). Indeed, state restrictions upheld by the Supreme Court focus on individual candidates, requiring them to obtain a specified number of petition signatures to appear on a general ballot. *See, e.g.*, *Storer*, 415 U.S. at 727.

No stretch of the imagination is needed to conclude that a candidate could run for office without significant support, despite the existence of general support for her party. If a candidate was not required to show any threshold of support through votes or petition signatures, she could win her primary and reach the general ballot with no significant modicum of support at all. This is especially true where, as here, "Libertarian candidates typically run unopposed in the AZLP primary[.]" Doc. 71 at 15. An unopposed candidate could win a spot on the general election ballot with only one vote in such a primary.

Plaintiffs appear to concede that the State has an independent interest in requiring an individual candidate to show that she enjoys sufficient support to be included on the ballot. Plaintiffs argue, however, that primary elections are inherently unsuitable for measuring voter support for minor party candidates. Doc. 63 at 7. They emphasize that AZLP candidates generally receive large numbers of votes in general

elections but few votes in primary elections, and thus primary vote totals do not show whether they enjoy support "among the general electorate." *Id.*

But Plaintiffs are not limited to showing support by obtaining votes in the primary election. AZLP candidates may obtain the designated number of signatures from qualified signers before the primary, win the primary with fewer votes, and still be placed on the general election ballot. If Plaintiffs are concerned that the true level of their support is more accurately reflected by results in the general election, rather than results in their smaller closed primary, then A.R.S. §§ 16-321 and 16-322 take a step in that direction by permitting AZLP to obtain signatures not only from registered AZLP voters, but also from registered independents and unaffiliated voters – a pool totaling more than one million voters in Arizona. Doc. 70 at 3, ¶ 16; Doc. 72-2 at 4, ¶ 16.

What is more, nothing in the Arizona statutes suggests that the State views a party's qualification for ballot access as sufficient for individual candidate qualification. To the contrary, parties who meet the requirements for representation on the ballot qualify, under the language of the statute, only to have a "column" on the general election ballot. A.R.S. § 16-801(A). They do not qualify to have candidates on the ballot. *Id.* Candidates must meet the additional support requirements through petition signatures or write-in votes. A.R.S §§ 16-321, 16-322. This structure shows that Arizona does not view a party's qualification as tantamount to candidate qualification.

b. Supreme Court References to "Eligible Voters."

Plaintiffs argue that "[e]very Supreme Court and lower federal court decision analyzing the constitutionality of ballot access laws cited by the parties in the proceedings thus far measures the modicum of support that such a law requires as a percentage of eligible voters." Doc. 63 at 6. True, but this does not mean that the phrase "eligible voters" can be lifted from the cases and applied to the AZLP closed primary. None of the Supreme Court cases addressed a closed primary; each addressed qualification requirements for general election ballots. *See Williams*, 393 U.S. 23; *Jenness*, 403 U.S. 431; *Storer*, 415 U.S. 724; *Am. Party*, 415 U.S. 767; *Munro*, 479 U.S. 189.

This distinction is significant. The Supreme Court has held that states may require candidates to show support from up to 5% of the general electorate. *See*, *e.g.*, *Jenness*, 403 U.S. 431. Arizona requires a showing of support from between 0.25 and 0.50% of qualified signers – a group smaller than the general electorate – and therefore requires an even lower percentage of the general electorate. This is best illustrated with actual numbers. In 2016, Arizona had 3,588,466 registered voters. Arizona Secretary of State, Voter Registration & Historical Election Data, https://www.azsos.gov/elections /voter-registration-historical-election-data (last visited July 3, 2017). For AZLP candidates for statewide office, there were 1,188,771 qualified signers. Doc. 69 at 7; Doc. 70 at 3, ¶¶ 16, 17; Doc. 72-2 at 4, ¶¶ 16, 17. 0.50% of these qualified signers – which totals 5,944 voters – would be 0.16% of the total

registered voters. 0.25% would be 2,972 voters, equal to 0.08% of total registered voters. Thus, Arizona effectively requires AZLP candidates to obtain signatures from less than 0.20% of registered voters, well below the 5% upheld by the Supreme Court.

While the Supreme Court has upheld state laws requiring candidates to obtain signatures from up to 5% of the general electorate, additional state law restrictions on who may sign candidate petitions may increase the burden on candidates and thus affect the constitutionality of the state laws in question. In *Storer*, the Supreme Court considered a law that limited those eligible to sign a nomination petition for an independent candidate to registered voters who had not participated in the primary election. 415 U.S. at 739. The Court noted that this limitation could substantially reduce the pool of eligible signers and thus increase the candidate's burden to obtain signatures to an amount exceeding 5% of eligible signers. *Id.* at 739. Noting that this "would be in excess, percentagewise, of anything the Court ha[d] approved to date," the Court remanded the case to determine the precise extent of the burden. *Id.* at 739, 746. A similar problem does not exist here. Arizona has limited those who may sign a nominee petition to "qualified signers," but this is a substantial pool that included 1,188,771 potential signers in 2016. Doc. 69 at 7; Doc. 70 at 3, ¶¶ 16, 17; Doc. 72-2 at 4, ¶¶ 16, 17. Arizona requires that AZLP candidates obtain signatures from 0.50% or less of this pool.

c. Other Responses to Plaintiffs' Math.

Plaintiffs' use of closed-primary voters as the denominator in its percentage calculations is flawed for several additional reasons, some of which are related to the discussion above.

First, in *Munro*, the Supreme Court noted that "it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among *the potential voters for the office*." 479 U.S. at 193 (emphasis added). The potential voters for the office are those who will vote in the general election. Measuring support for a candidate only within his own party, as Plaintiffs do by focusing on their closed primary, does not show the support a candidate enjoys among voters for her office in the general election. Plaintiffs identify no case where the required modicum of support was measured in such a way.

Second, although Arizona requires parties to hold primaries, and specifies the number of petition signatures required to appear on the primary ballot, it requires this as part of a process for appearing on the general election ballot – the ultimate object of the Arizona legislation. As noted above, a person who obtains the required number of signatures for the AZLP primary can qualify for the general election ballot even if she receives fewer votes in the primary than the number of petition signatures she obtained. She simply must win the primary, even with only a single vote. Thus, the modicum of support is shown by the petition signatures (or in the number of write-in votes if the candidate chooses that path). The Supreme

Court has recognized that states may use primaries as the method for establishing a sufficient modicum of support to appear on a general election ballot. *Munro*, 479 U.S. at 196 ("The primary election . . . functions to winnow out and finally reject all but the chosen candidates. We think that the State can properly reserve the general election ballot for major struggles . . . by conditioning access to that ballot on a showing of a modicum of voter support.") (quotation marks and citations omitted); *id.* at 197-98 ("To be sure, candidates must demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election. But requiring candidates to demonstrate such support is precisely what we have held States are permitted to do."). Because the ultimate effect of the Arizona legislation is to determine who appears on the general election ballot, the Arizona percentage requirements should be compared to the general electorate, consistent with the Supreme Court cases discussed above. As shown above, the percentage of general election voters from whom AZLP candidates must obtain signatures is well below 5%.

Third, if the percentage of closed-primary voters is relevant at all, AZLP candidates are not helpless to affect it. While some candidates may have been required to obtain signatures or primary votes from 30% of registered AZLP voters this year, they could reduce this percentage in subsequent years by attracting more voters to AZLP. The facts suggest that increasing AZLP membership is feasible. As the Secretary notes, membership increased from 24,394 in 2016 to 31,886 by April 1, 2017. Doc. 70 at 3, 6 ¶¶ 17,

34; Doc. 72-2 at 4, 6-7 ¶¶ 17, 34. A party may not use its low membership to reduce the support it must show for presence on the general ballot. States are not required to grant an advantage to less popular candidates to ensure they appear on the general election ballot. *See Munro*, 479 U.S. at 198. States only need ensure that the requirements of support for the office are reasonable and do not freeze the political status quo, but offer a real opportunity for minority and independent candidates to qualify for the ballot. *Am. Party*, 415 U.S. at 787.

In summary, the Court concludes that the Arizona legislation should be analyzed by looking to the percentage of qualified signers or the general electorate, not by focusing solely on the number of voters in AZLP's closed primary. When so tested, Arizona's requirement falls well below the 5% requirement upheld in Supreme Court cases.

4. 2016 Election Results.

There is no dispute that the Arizona statutes increased the number of signatures AZLP candidates must obtain. For the 2016 election, AZLP candidates for state legislative positions were required to obtain signatures or write-in votes from between 144 and 273 qualified signers, depending on the size of their district. Doc. 70 at 2, ¶ 4; Doc. 72-2 at 2, ¶ 4. Prior to H.B. 2608, these candidates had signature requirements as low as 7 signatures. Similarly, an AZLP candidate for Congress was required to obtain between 529 and 785 signatures or write-in votes in 2016, but previously needed only between 24 and 43 signatures to qualify for the ballot. Doc. 70 at 2, ¶¶ 7, 8; Doc. 72-2 at 2, ¶¶ 7,

8. Candidates for statewide office, such as governor, need signatures from 0.25% of qualified signers. Doc. 70 at 3, ¶ 10; Doc. 72-2 at 3, ¶ 10. In 2016, this amounted to 3,034 signatures for AZLP candidates. Doc. 70 at 3, ¶ 10; Doc. 72-2 at 3, ¶ 10. Prior to H.B. 2608, an AZLP gubernatorial candidate was required to submit 133 valid signatures. Doc. 70 at 3, ¶ 11; Doc. 72-2 at 3, ¶ 11.

It is undisputed that only one AZLP candidate qualified for the primary ballot in 2016 under the new signature requirements. Doc. 64 at 3, ¶ 11; Doc. 70 at 12, ¶ 11. Plaintiffs state that none appeared on the general election ballot. In contrast, 35 AZLP candidates appeared on the general election ballot in 2004, 19 in 2008, and 18 in 2012. Doc. 64 at 3, ¶ 10; Doc. 70 at 11, ¶ 10.

The Supreme Court has addressed the evidentiary value of comparing the number of minority party candidates appearing on the ballot before and after enactment of a challenged ballot access law. While such comparison is relevant, it is not controlling. As the Supreme Court explained in *Munro*:

> Much is made of the fact that prior to 1977, virtually every minor-party candidate who sought general election ballot position so qualified, while since 1977 only 1 out of 12 minor-party candidates has appeared on that ballot. Such historical facts are relevant, but they prove very little in this case, other than the fact that § 29.18.110 does not provide an insuperable barrier to minor-party ballot access. It is hardly a surprise that minor parties

> appeared on the general election ballot before § 29.18.110 was revised; for, until then, there were virtually no restrictions on access. Under our cases, however, Washington was not required to afford such automatic access and would have been entitled to insist on a more substantial showing of voter support. Comparing the actual experience before and after 1977 tells us nothing about how minor parties would have fared in those earlier years had Washington conditioned ballot access to the maximum extent permitted by the Constitution.

479 U.S. at 196-97.

The Court finds the present case very similar to *Munro*, where Washington passed a law which required candidates to receive at least 1% of all votes cast for the candidates' office in the state's open primary election before the candidate's name would be placed on the general election ballot. The Ninth Circuit found the law invalid primarily because of its practical effect on minor party candidates. The Court of Appeals noted that "[p]rior to 1977, candidates of minor parties qualified for the general election ballot in contests for statewide office with regularity," but "[t]he 1977 amendment . . . worked a striking change." *Socialist Workers Party v. Sec'y of State of Wash.*, 765 F.2d 1417, 1419 (9th Cir. 1985). "According to the affidavit of Washington's Supervisor of Elections, since 1977 minor parties have not been successful at qualifying candidates for the state general election ballot for statewide offices. Although one or more minor parties nominated candidates in each of the four statewide

elections held between 1978 and 1983, none qualified for the general election ballot." *Id.* (quotation marks omitted). Given these results, the Ninth Circuit found that Washington's ballot access law seriously impinged on the plaintiffs' protected rights and that Washington had "failed to present an interest substantial enough to warrant the restraint imposed on those rights." *Id.* at 1422.

The Supreme Court reversed, even in the face of the election results on which the Ninth Circuit relied. 479 U.S. at 196-97. The Supreme Court noted that its previous cases "establish with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot[.]'" *Id.* at 194 (quoting *Anderson*, 460 U.S. at 788-89). Because the Washington law imposed lower requirements than the laws upheld in *Jenness* and *American Party*, the Supreme Court found it constitutional. *Id.* at 199.

Plaintiffs in this case make essentially the same argument as the plaintiffs in *Munro*. They cite statistics showing that it is now more difficult for their candidates to qualify for the primary and general election ballots. But the Supreme Court in *Munro, American Party*, and *Jenness* upheld state ballot qualification laws that were more burdensome than Arizona's. The laws in these cases required candidates to demonstrate support of between 1% and 5% of all registered voters, where Arizona requires only between 0.25% and 0.50% of the smaller pool of qualified signers – and, as shown above, an even smaller percentage of

registered voters. In light of these Supreme Court cases and the discussion of actual election results in *Munro*, the Court cannot conclude that Plaintiffs have shown an unconstitutional burden.

5. Impact of the Scheme as a Whole.

Courts must review a state's ballot-access scheme as a whole. *Storer*, 415 U.S. at 730. The Court accordingly will consider other restrictions in the Arizona law.

Only two restrictions are apparent: AZLP candidates are limited to collecting signatures from qualified signers, and an individual who signs a nominating petition may not sign any other nominating petition. A.R.S. § 16-321(A), (E). These are not significant restrictions. Candidates may obtain signatures physically or electronically, A.R.S. §§ 16-321, 16-316-318, and, unlike many states, Arizona imposes no time limit on signature gathering as long as the nomination petitions are filed between 120 and 90 days before the primary election, A.R.S. 16-314. Other than complaining about the number of signatures required, Plaintiffs do not argue that Arizona has unduly restricted the signature gathering process.

Plaintiffs do contend that they cannot, in practice, obtain signatures from nonparty members. They argue that because "[n]on-members are not permitted to vote in AZLP's primary, [] independent and unaffiliated voters have no incentive to support a candidate seeking to run in such an election." Doc. 63 at 7. As a result, they argue, they are not able to obtain signatures from non-party members in practice. But this assertion is

hard to square with Plaintiffs assertion that they regularly receive significant support in the general election. Doc. 63 at 7. If a registered independent or unaffiliated voter supports an AZLP candidate in the general election, she has every incentive to sign the candidate's nominating petition. Plaintiffs cite declarations to support their assertion that the closed nature of AZLP's primary election deters independent and unaffiliated voters from signing their petitions. But the cited declarations actually show that it is a difference in philosophy between the voters and AZLP, or a reluctance by the candidates to seek support from these voters, that keeps AZLP candidates from obtaining the signatures of independent voters. *See, e.g.*, Doc. 42-4 at 3, ¶ 7 (declaration from Kim Allen asserting that she does not like to seek support from independent voters and they do not generally want to sign her petition because they are not part of the party and "may not share [their] political philosophy and goals").

The parties dedicate significant briefing to the question of whether AZLP candidates exercised reasonable diligence when trying to secure placement on the 2016 ballot. They reach contrary answers, relying on declarations and expert opinions concerning the quality of the efforts made by AZLP candidates and what could reasonably be expected of them. Facts relating to the ability of candidates to obtain ballot access in practice may inform the Court's inquiry into the reasonableness of the burden imposed on Plaintiffs. *See Munro*, 479 U.S. at 196-98; *Nader*, 531 F.3d at 1035. But where the Court has determined that the quantity of signatures required for ballot access falls

well within the 5% requirement generally upheld by the Supreme Court, and Plaintiffs have not identified any additional restrictions that would increase the burden imposed on them, the Court need not engage in a detailed and extensive factual consideration of the hours and techniques employed by each AZLP candidate to obtain signatures or write-in votes. While the Supreme Court has directed lower courts to consider whether a reasonably diligent candidate could be expected to satisfy the signature requirements and gain a place on the ballot, *Storer*, 415 U.S. at 742, evidence that some candidates struggled to satisfy those requirements is not, as *Munro* shows, sufficient to show that the scheme imposed an unconstitutional burden. As the Supreme Court has made clear, states are not required to provide candidates with essentially "automatic access" to the ballot. *Munro*, 479 U.S. at 197.

Plaintiffs additionally argue that AZLP candidates must seek signatures from independent and unaffiliated voters, a requirement that violates their right to freedom of association. Plaintiffs rely on *California Democratic Party v. Jones*, a case in which the Supreme Court considered a California law mandating the use of a blanket open primary to select each party's nominee. 530 U.S. at 570, 581-82. The Court noted that "a corollary of the right to associate is the right not to associate," and "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 574, 575. Forcing a party to involve non-members in its nominee selection process will inevitably change the party's message. *Id.* at 581-82. As a result, a law

requiring parties to open their nominee selection process to non-party members imposes a heavy burden and is "unconstitutional unless it is narrowly tailored to serve a compelling state interest." *Id.* at 582.

The Ninth Circuit similarly considered the validity of an Arizona provision allowing voters who were unaffiliated, registered as independents, or registered as members of parties that are not on the primary ballot to vote in the primary of their choice. *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003). Relying on *Jones*, the Ninth Circuit emphasized that forced association with nonmembers in the nominee selection process raised a risk of "influenc[ing] the choice of the nominee at the primary and [] caus[ing] partisan candidates to change their message to appeal to a more centrist voter base." *Id.* at 1282. The Ninth Circuit noted that "forcing the Libertarians to open their primary to nonmembers for the selection of party candidates raises serious constitutional concerns," but ultimately determined that resolution of these concerns was a factual issue and remanded to the district court for further consideration. *Id.* On remand, the district court found the provision unconstitutional because it imposed a severe burden on AZLP that was not justified by a compelling interest. *Arizona Libertarian Party v. Brewer*, No. 02-144-TUC-RCC (D. Az. Sept. 27, 2007) (unpublished order).

Jones and *Bayless* are distinguishable from this case. The law in *Jones* directly mandated the use of an open primary. Similarly, the law in *Bayless* mandated that nonmembers be allowed to vote in AZLP's

primary. Here, Arizona law requires only that AZLP candidates obtain a certain number of signatures before they may appear on the primary ballot. They are not required by the law to seek those signatures from non-AZLP voters. True, a candidate who cannot establish a modicum of support from the ranks of her own party may feel the need to turn to nonmembers to supplement her support, but the law does not require her to do so. This is a significant distinction from the legally-mandated participation of other parties at issue in *Jones* and *Bayless*.

Because Plaintiffs are required, at most, to obtain signatures from 30% of registered AZLP voters in any relevant jurisdiction, they can obtain sufficient signatures without looking outside their party. If the candidates or the party find this too daunting a task, they can work to increase their party membership. The Supreme Court has made clear that Arizona is not required to decrease its ballot access requirements for the benefit of less popular parties or candidates. *Munro*, 479 U.S. at 198 ("States are not burdened with a constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.").

There is another significant distinction between this case and the laws at issue in *Jones* and *Bayless*. Those laws permitted nonmembers of a party to participate directly in selection of the party's candidates. In this case, although a candidate may feel the need to seek signatures from qualified signers who are not members of her party, those signers will not have the right to

vote in the AZLP closed primary. Thus, AZLP will be free to select its nominee without involvement of nonmembers.

Finally, the Court notes that Plaintiffs' arguments could lead to absurd results. Suppose a minority political party has only five members. If Plaintiffs' associational argument is correct, Arizona could not require the party's candidates, as a practical matter, to obtain petition signatures from anyone other than party members. And because the party would be entitled to hold a closed primary under *Jones* and *Bayless*, the party could place candidates on the general election ballot with support from five or fewer voters. Such a result would be plainly inconsistent with Arizona's "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot[.]" *Anderson*, 460 U.S. at 788-89.

The Court concludes that Arizona's signature requirements, considered as a whole, do not impose a severe burden on Plaintiffs' right to freedom of association.

B. Constitutional Balancing.

In light of the discussion above, the Court concludes that the burden imposed on Plaintiffs by A.R.S. §§ 16-321 and 16-322 is reasonable. This is true when the actual numbers are considered, and whether the percentage requirement is calculated on the basis of qualified signers or the general electorate. In both instances, Arizona imposes a burden on Plaintiffs well below the 5% requirement upheld by the Supreme

Court. The fact that Plaintiffs placed fewer candidates on the ballot in 2016 is relevant, but not determinative. The total number of signatures required for AZLP candidates is lower than the numbers required for independent candidates and candidates from the two major parties, and a lighter burden than imposed on Green Party candidates when the Green Party's four-year petition requirement is considered. The Court cannot conclude that Plaintiffs have shown that the signature requirements pose an insurmountable obstacle to ballot access. Comparing the higher burdens placed on the other parties and independent candidates, the Court also concludes that the Arizona requirements are not discriminatory against Plaintiffs.[9]

"[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). The Court finds Arizona's interests sufficient here. As the

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[9] It is well-accepted that states may impose different restrictions on parties' access to the ballot depending on their size and history. *See Jenness*, 403 U.S. at 441-42 ("The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot."); *id.* at 440-41 ("We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths [to the ballot], neither of which can be assumed to be inherently more burdensome than the other.").

Supreme Court has held, "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442; *see also Munro*, 479 U.S. at 193; *Am. Party*, 415 U.S. at 782; *Lightfoot*, 964 F.2d at 871.

Plaintiffs argue that the State has failed to show that it has a genuine interest in requiring a modicum of support before appearance on the general election ballot – that Arizona has not shown that it has experienced voter confusion or fraud. Doc. 71 at 15. But the Supreme Court has "never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S. at 194. As the Supreme Court explained:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should

> be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96.

Balancing Arizona's legitimate interest in requiring a significant modicum of support before appearance on the general election ballot against the reasonable and nondiscriminatory burdens imposed by A.R.S. §§ 16-321 and 16-322, the Court concludes that the statutes are constitutional.[10]

C. Freedom of Association and Equal Protection.

Plaintiffs claim in Counts II and IV that the Arizona statutes violate their rights to freedom of association and equal protection. Doc. 42 at 22-25; Doc. 63 at 4, 13-16. Plaintiffs' freedom of association arguments are dealt with above. The Arizona statutes do not legally require Plaintiffs to associate with voters outside of their party or to include such voters in their primary elections, as did the laws at issue in *Jones* and *Bayless*.

Plaintiffs have also failed to show an equal protection violation. For reasons discussed above, the Court finds the Arizona laws to be nondiscriminatory.

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[10] The Court notes that it would reach this conclusion even if the evidence excluded at the beginning of this order were considered. Comparable evidence was not sufficient to defeat the state restrictions in *Munro*, and the Court concludes that it would not be sufficient here. *See* 479 U.S. at 196-97.

And even if H.B. 2608 could be viewed as having a greater impact on AZLP than other Arizona political parties, it would violate equal protection only if Plaintiffs showed that it was enacted with a discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976) (disparate impact resulting from a facially neutral law, without more, is not sufficient to establish a violation of the Equal Protection Clause). Plaintiffs do not attempt to make this showing.

IT IS ORDERED that Plaintiffs' motion for summary judgment (Doc. 63) is **denied** and the Secretary's cross-motion for summary judgment (Doc. 69) is **granted**. The Clerk of Court shall enter judgment in accordance with this order and terminate this matter.

Dated this 7th day of July, 2017.

/s/David G. Campbell
David G. Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-16-01019-PHX-DGC

[Filed July 10, 2017]

Arizona Libertarian Party, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Michele Reagan,	)
	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filed July 10, 2017, which granted the Motion for Summary Judgment, judgment is entered in favor of defendant and against plaintiffs'. Plaintiffs' to take nothing, and the complaint and action are dismissed.

Brian D. Karth
District Court Executive/Clerk of Court

July 10, 2017

s/ D. Draper
By Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16491

D.C. No. 2:16-cv-01019-DGC
District of Arizona, Phoenix

[Filed July 11, 2019]

ARIZONA LIBERTARIAN PARTY; MICHAEL KIELSKY,	)
Plaintiffs-Appellants,	)
v.	)
KATIE HOBBS, in her official capacity as Secretary of State of Arizona,	)
Defendant-Appellee.	)

ORDER

Before: WALLACE, TASHIMA, and McKEOWN, Circuit Judges.

The panel votes to deny the petition for rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D

ARIZONA STATUTORY PROVISIONS

16-321. Signing and certification of nomination petition; definition

A. Each signer of a nomination petition shall sign only one petition for the same office unless more than one candidate is to be elected to such office, and in that case not more than the number of nomination petitions equal to the number of candidates to be elected to the office. A signature shall not be counted on a nomination petition unless the signature is on a sheet bearing the form prescribed by section 16-314.

B. For the purposes of petitions filed pursuant to sections 16-312, 16-313, 16-314 and 16-341, each signer of a nomination petition shall be a voter who at the time of signing is a registered voter in the electoral district of the office the candidate is seeking.

C. If an elector signs more nomination petitions than permitted by subsection A of this section, the earlier signatures of the elector are deemed valid, as determined by the date of the signature as shown on the petitions. If the signatures by the elector are dated on the same day, all signatures by that elector on that day are deemed invalid. Any signature by that elector on a nomination petition on or after the date of the last otherwise valid signature is deemed invalid and shall not be counted.

D. The person before whom the signatures were written on the signature sheet is not required to be a resident of this state but otherwise shall be qualified to register to vote in this state pursuant to section 16-101 and, if not a resident of this state, shall register as a circulator with the secretary of state. A circulator shall verify that each of the names on the petition was signed in his presence on the date indicated, and that in his belief each signer was a qualified elector who resides at the address given as the signer's residence on the date indicated and, if for a partisan election, that each signer is a qualified signer. The way the name appears on the petition shall be the name used in determining the validity of the name for any legal purpose pursuant to the election laws of this state. Signature and handwriting comparisons may be made.

E. A person who signs a nominating petition must use that person's actual residence address unless there is no actual residence address assigned by an official governmental entity or the person's actual residence is protected pursuant to section 16-153. The signature of a person who signs a nominating petition and who uses only a description of the place of residence or an Arizona post office box address is valid if the person is otherwise properly registered to vote, has not moved since registering to vote and is eligible to sign the nominating petition.

F. For the purposes of this article, "qualified signer" means any of the following:

1. A qualified elector who is a registered member of the party from which the candidate is seeking nomination.

2. A qualified elector who is a registered member of a political party that is not entitled to continued representation on the ballot pursuant to section 16-804.

3. A qualified elector who is registered as independent or no party preferred.

16-322. Number of signatures required on nomination petitions

A. Nomination petitions shall be signed by a number of qualified signers equal to:

1. If for a candidate for the office of United States senator or for a state office, excepting members of the legislature and superior court judges, at least one-fourth of one percent but not more than ten percent of the total number of qualified signers in the state.

2. If for a candidate for the office of representative in Congress, at least one-half of one percent but not more than ten percent of the total number of qualified signers in the district from which such representative shall be elected except that if for a candidate for a special election to fill a vacancy in the office of representative in Congress, at least one-fourth of one percent but not more than ten percent of the total number of qualified signers in the district from which such representative shall be elected.

3. If for a candidate for the office of member of the legislature, at least one-half of one percent but not more than three percent of the total number of qualified signers in the district from which the member of the legislature may be elected.

4. If for a candidate for a county office or superior court judge, at least one percent but not more than ten percent of the total number of qualified signers in the county or district, except that if for a candidate from a county with a population of two hundred thousand persons or more, at least one-fourth of one percent but not more than ten percent of the total number of qualified signers in the county or district.

5. If for a candidate for a community college district, at least one-quarter of one percent but not more than ten percent of the total voter registration in the precinct as established pursuant to section 15-1441. Notwithstanding the total voter registration in the community college district, the maximum number of signatures required by this subdivision is one thousand.

6. If for a candidate for county precinct committeeman, at least two percent but not more than ten percent of the party voter registration in the precinct or ten signatures, whichever is less.

7. If for a candidate for justice of the peace or constable, at least one percent but not more than ten percent of the number of qualified signers in the precinct.

8. If for a candidate for mayor or other office nominated by a city at large, at least five percent and not more than ten percent of the designated party vote in the city, except that a city that chooses to hold nonpartisan elections may by ordinance provide that the minimum number of signatures required for the candidate be one thousand signatures or five percent of the vote in the

city, whichever is less, but not more than ten percent of the vote in the city.

9. If for an office nominated by ward, precinct or other district of a city, at least five percent and not more than ten percent of the designated party vote in the ward, precinct or other district, except that a city that chooses to hold nonpartisan elections may provide by ordinance that the minimum number of signatures required for the candidate be two hundred fifty signatures or five percent of the vote in the district, whichever is less, but not more than ten percent of the vote in the district.

10. If for a candidate for an office nominated by a town at large, by a number of qualified electors who are qualified to vote for the candidate whose nomination petition they are signing equal to at least five percent and not more than ten percent of the vote in the town, except that a town that chooses to hold nonpartisan elections may provide by ordinance that the minimum number of signatures required for the candidate be one thousand signatures or five percent of the vote in the town, whichever is less, but not more than ten percent of the vote in the town.

11. If for a candidate for a governing board of a school district or a joint technical education district, at least one-half of one percent of the total voter registration in the school district or joint technical education district if the board members are elected at large or one percent of the total voter registration in the single member district if governing board members are elected from single member districts or one-half of one percent of the total voter registration in the single

member district if joint technical education district board members are elected from single member districts. Notwithstanding the total voter registration in the school district, joint technical education district or single member district of the school district or joint technical education district, the maximum number of signatures required by this paragraph is four hundred.

12. If for a candidate for a governing body of a special district as described in title 48, at least one-half of one percent of the vote in the special district but not more than two hundred fifty and not fewer than five signatures.

B. The basis of percentage in each instance referred to in subsection A of this section, except in cities, towns and school districts, shall be the number of qualified signers as determined from the voter registration totals as reported pursuant to section 16-168, subsection G on March 1 of the year in which the general election is held. In cities, the basis of percentage shall be the vote of the party for mayor at the last preceding election at which a mayor was elected. In towns, the basis of percentage shall be the highest vote cast for an elected official of the town at the last preceding election at which an official of the town was elected. In school districts or joint technical education districts, the basis of percentage shall be the total number of active registered voters in the school district or joint technical education district or single member district, whichever applies. The total number of active registered voters for school districts or joint technical education districts shall be calculated using the periodic reports prepared by the county recorder pursuant to section 16-168,

subsection G. The count that is reported on March 1 of the year in which the general election is held shall be the basis for the calculation of total voter registration for school districts or joint technical education districts.

C. In primary elections the signature requirement for party nominees, other than nominees of the parties entitled to continued representation pursuant to section 16-804, is at least one-tenth of one percent of the total vote for the winning candidate or candidates for governor or presidential electors at the last general election within the district. Signatures must be obtained from qualified electors who are qualified to vote for the candidate whose nomination petition they are signing.

D. If new boundaries for congressional districts, legislative districts, supervisorial districts, justice precincts or election precincts are established and effective subsequent to March 1 of the year of a general election and prior to the date for filing of nomination petitions, the basis for determining the required number of nomination petition signatures is the number of qualified signers in the elective office, district or precinct on the day the new districts or precincts are effective.